Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY,
Petitioner,
v.
JOETTE LORION, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,
v.
JOETTE LORION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER FLORIDA POWER & LIGHT COMPANY

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QUESTION PRESENTED

Whether the United States Courts of Appeals have subject matter jurisdiction, under provisions of the Atomic Energy Act, 42 U.S.C. § 2239, and the Administrative Orders Review Act, 28 U.S.C. § 2342, to review a final order of the Nuclear Regulatory Commission denying a request that it suspend the operating license of a nuclear power plant.

PARTIES TO THE PROCEEDING

Joette Lorion, doing business as the Center for Nuclear Responsibility, was the petitioner in the proceeding in the United States Court of Appeals for the District of Columbia Circuit.

The United States Nuclear Regulatory Commission and the United States of America were respondents in the Court of Appeals proceeding. Florida Power & Light Company intervened in the proceeding below in support of respondents. Florida Power & Light Company is the parent company of Land Resources Investment Company, Fuel Supply Service, Incorporated, and W. Flagler Investment Corp.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 712 F.2d 1472 (D.C. Cir. 1983) and is reproduced in the appendix to the petition in No. 83-703. That opinion was issued on

review of a decision of the Director of the Office of Nuclear Reactor Regulation which is reported at 14 N.R.C. 1078 (1981) and is also reproduced in the appendix to the petition in No. 83-703.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated July 26, 1983 and is reproduced in the appendix to the petition in No. 83-1031.[2] The Government's Petition for Rehearing and Suggestion for Rehearing *en banc* were denied on September 22, 1983 (Govt. App. 3a-5a). On October 13, 1983, the Court of Appeals stayed issuance of its mandate pending application for a writ of certiorari. A petition for a writ of certiorari was filed by Florida Power & Light Company ("FPL") on October 28, 1983 (No. 83-703) and by the United States Nuclear Regulatory Commission and the United States of America on December 21, 1983 (No. 83-1031). The petitions were granted and the cases consolidated by order of this Court entered on March 26, 1984. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

This case involves consideration of section 189 of the Atomic Energy Act, as amended (42 U.S.C. § 2239), and the Administrative Orders Review Act, 28 U.S.C. §§ 2342 and 2347, and 10 CFR §§ 2.202 and 2.206. These statutes and regulations are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

This case presents a single issue for the Court's resolution: whether the courts of appeals have jurisdiction to review orders of the Nuclear Regulatory Commission

[1] Cited hereinafter as "Pet. App. ——."

[2] Cited hereinafter as "Govt. App. ——."

which deny requests for the suspension of nuclear power plants' operating licenses. The issue turns on construction of the statutes referred to above. 28 U.S.C. § 2342 (4) confers upon the courts of appeals exclusive jurisdiction to review "all final orders of the [Nuclear Regulatory] Commission made reviewable by section 2239 of Title 42." The latter provision, which is section 189 of the Atomic Energy Act, relates to hearings, section 189 (a), and judicial review, section 189(b). Paragraph (1) of 42 U.S.C. § 2239(a) provides that:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236 (c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(b) specifies that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in" 28 U.S.C. § 2342(4). The lower court's application of these provisions is described below.

1. The NRC Proceeding

On September 11, 1981, Joette Lorion, on the letterhead of the Center for Nuclear Responsibility, wrote to the Nuclear Regulatory Commission requesting that Turkey Point Nuclear Power Plant, Unit No. 4, owned and operated by FPL, be shut down immediately in order to inspect the plant's steam generator tubes for possible leaks. Ms. Lorion also made a number of allegations

concerning the safety of the unit's steam generators and asked that consideration be given to suspension of the unit's operating license because of her concerns over the safety of the reactor pressure vessel. (Joint Appendix, p. 6; Pet. App. 16-17). This letter was referred to the Director of Nuclear Reactor Regulation in accordance with an NRC regulation (10 CFR § 2.206) which was adopted "to provide a procedure for the submittal of such requests" to the Director. 39 Fed. Reg. 12,353 (April 5, 1974).

The procedure requires the Director to entertain the request of any person, regardless of interest, to initiate an enforcement proceeding, *i.e.*, "to institute a [show cause] proceeding pursuant to § 2.202[3] to modify, suspend or revoke a license, or for such other action as may be proper." 10 CFR § 2.206(a). In response to such a request, the Director must "either institute the requested proceeding in accordance with this subpart or . . . advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor." 10 CFR § 2.206 (b). If the Director does issue a show cause order, section 189(a) and the Commission's implementing regulations offer an opportunity for a full adjudicatory hearing to the licensee or other person whose interest may be affected by the proceeding. 10 CFR § 2.202; 10 CFR Part 2, Subpart G.

However, section 2.206 has been interpreted to require that a show cause order be issued pursuant to 10 CFR § 2.202 only if the Director finds that a "substantial health or safety issue had been raised" by the request. *In re Consolidated Edison Co.* (Indian Point, Units 1, 2, & 3), 2 N.R.C. 173, 176 (1975). In making this de-

[3] 10 CFR § 2.202 authorizes designated NRC officials, including the Director, to institute administrative show cause proceedings to modify, suspend, or revoke a license.

termination, the Director "is free to rely on a variety of sources of information, including staff analyses of generic issues, documents issued by other agencies, and the comments of the licensee on the factual allegations." *In re Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), 7 N.R.C. 429, 433 (1978), *aff'd sub nom. Lake Michigan Federation v. NRC*, 606 F.2d 1364 (D.C. Cir. 1979).

In accordance with this procedure, the Director in this case thoroughly considered Ms. Lorion's claims regarding steam generator tube leakage, steam generator safety, and integrity of the reactor pressure vessel, during the course of which he developed a 547-page record.[4] The Director's decision concluded that the issue of shutting down the unit to permit inspection of the steam generator tubes was moot since the unit had been shut down and an inspection commenced subsequent to the receipt of Ms. Lorion's letter. (Pet. App. 19). The Director's decision also addressed Ms. Lorion's allegations concerning steam generator safety, described the monitoring program which had been undertaken by FPL and the limitations on operation which had been imposed by the NRC (Pet. App. 19-20) and concluded that "[t]he procedures and safeguards instituted in relation to that problem are sufficient to safeguard the public health and safety." (Pet. App. 22; footnote omitted). With respect to Ms. Lorion's concerns relating to pressure vessel integrity, or thermal shock, the decision concluded that "reactor vessel failure from such an event in the near term is unlikely. Therefore, no immediate licensing action is required for operating reactors including Unit 4." (Pet. App. 23; footnote

[4] The record includes, *inter alia*, utility operating licenses, license amendments, NRC staff evaluations, NRC Regulatory Guides, and Safety Evaluations by the Office of Nuclear Reactor Regulation.

omitted). It also described the action that was being "taken to resolve the long-term problem." *Id.*

Accordingly, the decision denied Ms. Lorion's request. (Pet. App. 16). Ms. Lorion thereafter requested the Commission to rescind or set aside the decision. However, the Commission neither took such action (Pet. App. 3) nor did it exercise its discretionary authority under section 2.206(c)(2) to review the Director's decision, which consequently became the final action of the agency.

2. The Court of Appeals' Decision

Ms. Lorion petitioned for review of the Director's decision in the Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239(b). Among other arguments, the petition asserted that the NRC's section 2.206 procedures are arbitrary and capricious and fail to meet statutory requirements. She argued that she was entitled to a public hearing and, alternatively, that her letter was not intended as a petition pursuant to section 2.206. She also argued that the NRC had violated NEPA[5] in connection with the licensing of repairs to the Turkey Point steam generators. (Pet. App. 3). FPL intervened in support of the Federal respondents and of the validity of the NRC's action.

In the decision below the Court of Appeals noted that, because the NEPA contentions had not been raised in Ms. Lorion's September 1981 letter, they had not been "subjected to agency scrutiny during the administrative process." (Pet. App. 4). It therefore held that the NEPA arguments were not "properly before us." *Id.* It also expressly rejected Ms. Lorion's argument that the letter should not have been treated "as a section 2.206 request"

[5] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.*

and approved the Commission's policy "to treat 'any' request for the modification, suspension, or revocation of a license . . . " under that provision. *Id.* Therefore, it viewed the petition for review as asking "us to consider the Commission's treatment of the petitioner's September 1981 letter under 10 C.F.R. § 2.206." *Id.* With respect to that request, the court below held that it lacked subject matter jurisdiction to review a Director's decision not to institute show cause proceedings pursuant to 10 CFR § 2.202.[6] (Pet. App. 13-14). And, on the presumption that such jurisdiction is possessed by the district courts, the Court of Appeals dismissed the case and ordered it transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631 (Pet. App. 14-15).

The court below held that section 189(b) and 28 U.S.C. § 2342(4) only confer upon the courts of appeals authority to review final orders of the NRC entered after a "formal proceeding."[7] The court concluded that a decision not to institute a proceeding pursuant to 10 CFR § 2.202 to modify, revoke or suspend a license does not constitute such a "formal proceeding." (Pet. App. 2, 6, 13-14).

The court of appeals recognizes that its conclusion is in conflict with its own prior decisions and the decisions of every other court that has considered the jurisdictional issue. However, the opinion states that the court below is "no longer comfortable" (Pet. App. 10) with what it perceived as inconsistent applications of the term "pro-

[6] The court below reached that conclusion notwithstanding the fact that, pursuant to a uniform line of prior authority (*infra*, pp. 12-14), all of the parties assumed that the courts of appeals possess such jurisdiction, and did not raise or brief the issue. In fact, the question was raised for the first time by the panel at oral argument.

[7] The court below apparently used the phrase "formal proceeding" to designate those proceedings "in which a person may, upon request, demand a hearing." (Pet. App. 5).

ceeding" in subsections (a) and (b) of section 189 of the Atomic Energy Act. The opinion states that:

> The conclusion of this court in *Porter County* that section 2.206 requests do not entail "proceedings" under 42 U.S.C. § 2239(a) for procedural purposes, 606 F.2d at 1369, and the Commission's reiteration in the present case that "[u]nless and until granted, a [request for enforcement] is not a 'proceeding' where the requestor has any right to present evidence," Government Brief at 24-25, precludes this court from viewing the section 2.206 process as a "necessary" part of the NRC's formal licensing proceedings for jurisdictional purposes.

(Pet. App. 12; brackets in original). Because "Congress has explicitly referenced its use of the word 'proceeding' in the statute's jurisdictional section to the kinds of 'proceedings' specified in the statute's procedural section" (Pet. App. 11-12), and because of "the Commission's steadfast insistence that the section 2.206 process does not entail a 'proceeding' within the meaning of 42 U.S.C. § 2239(a) . . ." (Pet. App. 13), the court below declined to "import the well-founded presumption against bifurcation of judicial forums" or "to read notions of judicial economy into . . ." the instant statutory review scheme and concluded it lacked subject matter jurisdiction over the petition. (Pet. App. 12).

SUMMARY OF ARGUMENT

Section 189 of the Atomic Energy Act, as consistently interpreted in cases prior to this one, is a straightforward provision which specifies that jurisdiction for review of NRC licensing actions lies in the courts of appeals. Under this construction, the rejection by the Director of an enforcement request under 10 CFR § 2.206 is treated, for purposes of judicial review, no differently than a decision resulting after the issuance of a show cause order and a formal adjudication. In consequence of all previous decisions under section 189, the fact that the

NRC's decision is made at an earlier, rather than later, stage of a proceeding does not affect the jurisdiction granted to the courts of appeals under section 189(b) and the Administrative Orders Review Act, 28 U.S.C. § 2342(4).

The heretofore uniform conclusion of the circuits that have addressed the question now before this Court is consistent with the language of section 189. Contrary to the lower court's formalistic and inflexible reading of the statute, the terms "hearing" and "proceeding" are not coextensive and interchangeable. Instead, a Director's denial of a section 2.206 request may be construed, as earlier decisions have, as "a necessary first step" in a proceeding under section 189(a). Such an interpretation results in the treatment of the systematic processing of a section 2.206 request, culminating in a written denial explaining the Director's reasoning, as a "proceeding" and comports with the terms of section 189(a).

The conclusion of the court below, equating proceedings with formal adjudications, was therefore not required by the language of the statute. Nor was it required by the legislative history. Although that history does not directly address the question, it is fully consistent with the conclusion that Congress intended the courts of appeals to have jurisdiction over all NRC licensing decisions. Moreover, by avoiding the risks of inconsistent district court decisions and the delays involved in a two-tier system of review, court of appeals jurisdiction over all NRC licensing decisions effectuates the overall objective of the Atomic Energy Act to implement a uniform national policy for the development and regulation of nuclear energy.

The refusal of the court below to consider otherwise relevant policies also conflicts with the expressed views of this Court. In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), the Court indicated that a jurisdictional statute should be interpreted to effect desired practical results where it is consistent with legislative policy. A

growing number of courts and commentators have pointed out the benefits to be gained from interpreting jurisdictional grants in a way which promotes efficiency, accuracy, and uniformity. The decision below interposes the district court between the agency and the court of appeals and thereby creates an unnecessary, duplicative layer of judicial review intended to be eliminated by the Administrative Orders Review Act, raises the possibility that the proper forum for review of the same enforcement request may depend on whether the agency's response is positive or negative, tends to bifurcate judicial review of claims arising out of essentially the same facts and interferes with judicial uniformity and the development of centralized expertise.

Finally, the administrative record compiled in connection with a Director's denial of a section 2.206 request is, as in this case, ordinarily adequate to support review by the courts of appeals. In the infrequent cases in which the record may be inadequate, the courts of appeals may remand to the agency for supplementation of the record.

Accordingly, the decision below is not required by the language or history of the governing statutes, is inconsistent with the objectives of the Atomic Energy and Administrative Orders Review Acts and is in conflict with policy considerations relating to the appropriate forum for judicial review.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 189 OF THE ATOMIC ENERGY ACT IS NOT WARRANTED BY THE LANGUAGE OF THE STATUTE

As pointed out above, NRC regulations (10 CFR §§ 2.202 and 2.206) implementing section 189 establish a scheme under which requests for enforcement action are considered and responded to with the degree of formality justified by the facts presented and the matters raised. If serious licensee violations or potentially hazardous conditions are likely, the Director may issue a show cause order and the licensee or other persons whose interest may be affected by the proceeding may request a hearing. If, on the other hand, the Director concludes that the claims made by the requesting party do not justify the issuance of such an order, the proceeding is terminated.

Neither logic nor the language of section 189 supports the holding of the court below that the forum for judicial review should differ depending on the stage at which the final decision is made.[8] The Court of Appeals' reading of the statute as one which "explicitly restricts our reviewing jurisdiction to those final orders entered in the kinds of formal 'proceedings' specified in 42 U.S.C. § 2239(a) . . ." (Pet. App. 11) and its view that "a section 2.206 request [merely] triggers a preliminary investigation by the NRC's staff to determine whether or not a formal proceeding should be instituted. . ." (Pet. App. 6) rest on the misconception that section 189(a) proceedings

[8] The decision below is clearly limited to "denials of section 2.206 requests." (Pet. App. 14). If such a request is granted, a license amendment proceeding is initiated and a hearing will be held at the request of the licensee or any other person whose interest may be affected by the proceeding. Under the rationale of the decision below, exclusive jurisdiction to review that proceeding is unquestionably in the courts of appeals.

must be "formal," *i.e.*, proceedings in which an opportunity for a hearing is afforded. The court's conclusion in this regard was based on precedent holding that hearings on section 2.206 enforcement requests were properly denied by the NRC. *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979); *Porter County Chapter of the Izaak Walton League v. NRC*, 606 F.2d 1363 (D.C. Cir. 1979).

In both *Illinois* and *Porter County*, the courts rejected arguments that a requesting party is automatically entitled to a formal, evidentiary hearing, reasoning that "[t]he agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the statute to warrant full proceedings." *Porter County*, *supra*, 606 F.2d at 1369. Contrary to the view of the court below, this language does not imply that both subsections (a) and (b) of section 189 refer only to "formal" or "full blown" proceedings in which an opportunity for a hearing is extended. Indeed, the *Porter County* court affirmed the NRC's section 2.206 denial without questioning its jurisdiction to do so, logically declining to impose a requirement that a section 189(a) proceeding reach a level of formality not specified by the statute itself in order to be subject to judicial review in accordance with section 189(b).

The interpretation of section 189(a) adopted by the court below is in fact inconsistent with every other judicial ruling on the issue. The term "proceeding" in subsection (a) has been uniformly construed in a manner which includes the systematic process which the NRC has established under sections 2.202 and 2.206 of its rules for deciding any license suspension request—whether or not that process included an opportunity for a hearing. Thus, in *Natural Resources Defense Council, Inc. v. NRC*, 606 F.2d 1261 (D.C. Cir. 1979), the court agreed with the NRC's argument that appeals of denials of requests that

it assert its licensing authority were within the courts of appeals' exclusive jurisdiction. The petitioner's contrary contention relied on the fact that the NRC's decision refusing, for lack of statutory authority, to license certain tanks constructed for the storage of high level radioactive waste preceded, and rendered unnecessary, any licensing action. According to the D.C. Circuit,

> In the circumstances of this case, the absence of an application for a license is not dispositive. Since a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license, we hold that NRC's decision was "entered in a proceeding" for "the granting . . . of any license."

Id. at 1265. The same court followed its earlier *NRDC* holding in *Seacoast Anti-Pollution League of New Hampshire v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982), concluding, in a situation similar to Lorion's, that an NRC

> determination whether to institute a revocation proceeding was "a necessary first step" in any proceeding for the revocation of the Seabrook construction permits. Hence, we hold that the Commission's final order refusing [a section 2.206 request] to institute such a proceeding is reviewable by this court under 42 U.S.C. § 2239 (1976).

690 F.2d at 1028. Until the D.C. Circuit reversed its previous holdings in *NRC* and in *Seacoast*, the precedent on this subject was uniform.[9] Every court of appeals

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[9] *See* Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982), upholding the NRC's denial of a Section 2.206 request to institute construction permit revocation proceedings on the basis of allegedly unresolved safety concerns; County of Rockland v. NRC, 709 F.2d 766 (2nd Cir. 1983), *cert. denied*, 104 S. Ct. 485 (1983) (NRC denial of 2.206 request reviewable in courts of appeals); Simmons v. Arkansas Power & Light Co., 655 F.2d 131 (8th Cir. 1981); Sunflower Coalition v. NRC, 534 F. Supp. 446 (D. Colo. 1982); Desrosiers v. NRC, 487 F. Supp. 71 (E.D. Tenn. 1980); Susquehanna Valley Alliance v. Three Mile Island, 485 F. Supp. 81 (M.D. Pa. 1979), *aff'd/rev'd in part*, 619 F.2d 231

dealing with the question either expressly decided or assumed that it is vested with jurisdiction to review the NRC's decision upon an enforcement request even if the request was denied without affording the requesting party an opportunity for a hearing.

In large part the conclusion of the court below that the separate lines of authority represented, on the one hand, by *Porter County* and, on the other, by *NRDC* are irreconcilable is based on a misunderstanding of the hearing requirement of section 189(a) and the level of formality which that provision requires. The opinion below repeatedly emphasizes that section 189(b) confers jurisdiction upon courts of appeals to review a final NRC licensing order only if such order results from a "formal" proceeding, *i.e.*, from a proceeding in which an interested person may request a hearing.[10] (*See, e.g.*, Pet. App. 2, 5, 13).

However, this Court has held that even though the governing statute provides that a permit for the discharge of pollutants be issued "after opportunity for public hearing," [11] the proceeding may be concluded without a hearing when the contentions advanced fail to meet "a threshold burden of tendering evidence suggesting the need for a hearing." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 214 (1980). In that case, the Court upheld the denial by the Environmental Protection Agency of a hear-

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(3rd Cir. 1980), *cert. denied sub nom.* General Public Utilities Corp. v. Susquehanna Valley Alliance, 449 U.S. 1096 (1981); Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979), *appeal dismissed*, 605 F.2d 556 (6th Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); Paskavitch v. NRC, 458 F. Supp. 216 (D. Conn. 1978).

[10] In view of the fact that the NRC regulations provide an opportunity for a full adjudicatory hearing, 10 CFR Part 2, Subpart G, that is apparently the type of hearing to which the court was referring.

[11] Section 402 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1342.

ing where the only hearing request submitted raised no material issue of fact. According to the Court, a holding below to the opposite effect was

> contrary to this Court's approval in past decisions of agency rules, similar to those at issue here [and which implement statutory hearing mandates], that have required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing. See, *e.g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. at 620-621, 93 S.Ct., at 2478-2479, and cases cited therein.

Id. at 214. Indeed, the D.C. Circuit has in the past applied the same principle to proceedings which it clearly recognized to fall within section 189(a) of the Atomic Energy Act. In *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974), that court upheld the Commission's denial of a hearing on an operating license application to an interested person because of the latter's failure to inform the Commission, as required by the regulations (10 CFR § 2.714(a)), of the contentions to be advanced in the requested hearing and the bases therefor. *See* also *Union of Concerned Scientists v. NRC*, No. 82 2053 (D.C. Cir. May 25, 1984), slip op. at 24.

Viewed in light of *Pacific Legal Foundation* and *BPI*, *Porter County* and *Illinois* do no more than authorize the NRC to conclude section 189(a) proceedings without convening pointless adjudicatory hearings. The lower court's contrary impression that "the Commission's processing of such [section 2.206] requests repeatedly has been held *not* to constitute a 'proceeding' under 42 U.S.C. § 2239(a)" (Pet. App. 7), citing *Illinois* and *Porter County*, owes more to possible imprecision in the language of those holdings and in the briefs below [12] than to

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[12] The language used in Illinois is not completely clear and can be read as meaning that a Director's denial, without having afforded an opportunity for a hearing, either is not part of a "proceeding"

the intended scope of the earlier cases. Thus, in *Porter County*, the D.C. Circuit Court prefaced its analysis by explaining that the challenged agency action related to "the procedure by which the Nuclear Regulatory Commission (NRC) passes on a request to institute an adjudicatory proceeding to suspend and revoke a permit to construct a nuclear power plant." 606 F.2d at 1365. The context of the decision was the NRC's refusal to "institute an adjudicatory proceeding" or to "launch full-blown proceedings simply because a violation of the statute is claimed." *Id.* at 1369. In reaching this conclusion, it described the Seventh Circuit's ruling in *Illinois* as "congruent" with its own. *Id.* at 1369 n.16.

The conclusion of the court below that, because the NRC may dispose of requests for enforcement action without "adjudicatory" or "full-blown" proceedings and without "hearings," the section 2.206 process is not a section 189(a) proceeding, is therefore not compelled by the *Porter County* and *Illinois* opinions. These cases can be read, more narrowly than did the Court of Appeals but entirely consistently with *NRDC* and its progeny, to permit the use of informal, summary procedures to conclude section 189(a) proceedings in appropriate situa-

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at all or merely is not part of a "formal proceeding." 591 F.2d at 14. And, in its Petition for Rehearing and Suggestion for Rehearing En Banc, the Government explained to the court below that:

> Past statements such as those in Porter County v. NRC, 606 F.2d 1363 (D.C. Cir. 1979), that section 2.206 requests do not require full proceedings under 42 U.S.C. § 2239(a), and in the Commission's brief that "[u]nless and until granted, a [request for enforcement] is not a 'proceeding' where the requester has any right to present evidence," were made in response to arguments that 2.206 requests mandated formal, adjudicatory hearings, and meant no more than that a 2.206 request does not automatically require an adjudicatory hearing. They did not mean that a 2.206 denial cannot be a step in a proceeding prior to any hearing, or cannot itself be an informal proceeding.

Petition for Rehearing, at 3 n.2.

tions. The court below thus erred in equating proceedings under section 189(a) with "formal" proceedings, *i.e.*, with proceedings in which interested persons may request a hearing.

Contrary to the decision of the Court of Appeals, therefore, the interpretation it rejected "does not allow 'proceeding' to mean one thing for procedural purposes and another for jurisdictional purposes." (Pet. App. 11). Rather, the position that section 189 can reasonably be construed as granting courts of appeals jurisdiction to review denials of section 2.206 enforcement requests as the first step in a proceeding in which a hearing is neither justified nor mandated is wholly consistent with the terms of the statute. The Court of Appeals' constriction of its review jurisdiction was consequently not warranted.

II. THE COURT OF APPEALS' DECISION DEFEATS THE PURPOSE OF SECTION 189 OF THE ATOMIC ENERGY ACT

As the court below observed, the legislative history specifically addressed to the adoption of section 189 is "sparse." [13] (Pet. App. 13). In *NRC*, however, the same

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[13] The statutory history that does exist favors the view rejected by the Court of Appeals. Two versions of section 189 introduced in Congress were not enacted. The first provided for court of appeals review over NRC orders "granting, denying, suspending, revoking, modifying or rescinding any license." H.R. 9757, 83d Cong., 2d Sess. § 189 (1954). The other provided for court of appeals review of suits to "enjoin, set aside, annul, or suspend any order of the Commission." H.R. 8862, 83d Cong., 2d Sess. § 189 (1954). The provision as passed permits review of "[a]ny final order entered in any proceeding" for "the granting, suspending, revoking, or amending of any license."

It can reasonably be inferred that Congress rejected the two proposed versions of section 189 in favor of language somewhere between them because Congress did not intend the courts of appeals to review NRC orders unrelated to licensing, such as proceedings for the imposition of penalties. *See* NRC v. Radiation Technology, Inc., 519 F. Supp. 1266, 1274-75 (D.N.J. 1981). Nor is there any

court was able to conclude that construing the provision to permit court of appeals review of NRC decisions denying requests to exert licensing authority "is fully consistent with this history." 606 F.2d at 1265 n.11. In deciding to reverse its earlier, uniformly followed, holding in *NRDC* because it found "no evidence . . . to suggest that Congress envisioned its jurisdictional grant in section 2239(b) to extend beyond orders entered in formal hearings . . ." (Pet. App. 13), the Court of Appeals in this case ignored recognized indicia of legislative intent and reached an unwise and impractical result.

A. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Timely and Uniform Review of the NRC's Exercise of Licensing Authority

In a recent decision of the Tenth Circuit, the intent underlying the judicial review provisions of the Atomic Energy Act was clearly described.

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indication that Congress wanted court of appeals review limited to orders actually impacting licenses. Rather, it appears that Congress intended the courts of appeals to have jurisdiction to review all orders related to nuclear licensing. *Cf.* Sunflower Coalition v. NRC, 534 F. Supp. 446 (D. Colo. 1982) (courts of appeals have jurisdiction over NRC licensing decisions).

This inference is strengthened by the fact that Congress was aware that certain kinds of judicial proceedings arising out of the administration of the Atomic Energy Act should be heard in the district courts. Sections 232, 233 and 234 of the Act (42 U.S.C. §§ 2280, 2281 and 2282) expressly so provide with respect to injunction and contempt proceedings and proceedings for the imposition of civil monetary penalties. No similar provision is made with respect to any licensing matters. Further, Congress amended section 189 as recently as 1983, but did nothing to limit court of appeals jurisdiction over section 2.206 denials, implying concurrence in the holdings that such jurisdiction exists. *See* Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 733 (1975); United States v. Republic Steel Corp., 491 F.2d 315 (6th Cir. 1974).

> The Atomic Energy Act represents an effort to implement a coherent plan for the development and regulation of nuclear energy. *See* 42 U.S.C. §§ 2012, 2013. An integral part of this plan is the speedy and final review of agency actions and regulations pursuant to the Atomic Energy Act. *See* H.R. Rep. No. 2122, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Ad. News 4303, 4306 (court of appeals review was chosen as the "more modern method and . . . best method for review of orders of administrative agencies" because of its "simplicity and expedition.") The review mechanism chosen by Congress enables prompt implementation of national nuclear policy, by avoiding the delays of multiple litigation and the risk of inconsistent district court decision. *See Lubrizol Corp. v. Train*, 547 F.2d 310 (6th Cir. 1976).

Quivira Mining Co. v. EPA, 728 F.2d 477, 482 (10th Cir. 1984). In *Quivira* the court held that a transfer of functions from the Atomic Energy Commission to the EPA, resulting from legislation which was silent on procedures for judicial review, did not affect the circuit court's exclusive review jurisdiction "[u]ntil Congress clearly indicates its intent to alter the coherent energy plan inherent in the Atomic Energy Act." *Id.*

The Tenth Circuit's approach, which sought to interpret a jurisdictional grant whose legislative history offered no aid in a manner consistent with the purpose of the statutory scheme, is similar to the practice followed by this Court and counselled by commentators. Thus, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), the Court considered the likely intent of the section of the Federal Water Pollution Control Act providing for court of appeals' review of EPA actions "in issuing or denying any permit . . . ." California administers its own program of permit issuance, and the EPA vetoed a permit proposed by the state authority. The Court reversed a court of appeals decision that the agency action

did not amount to "issuing or denying" a permit, holding that the effect of a veto was tantamount to a denial. In reaching its decision, this Court expressed its preference for construing the statute broadly to effectuate the presumed legislative design. "Under the contrary construction of the Court of Appeals, denials of . . . permits would be reviewable at different levels [and] would likely cause delays in resolving disputes . . . Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system." 445 U.S. at 196-97. And in *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963), a unanimous Supreme Court declared a refusal to suspend an order of deportation to be directly reviewable in the courts of appeals as a "final order of deportation." Reversing the contrary decision of the Second Circuit, the Court rejected what it deemed the "[b]ifurcation of judicial review" which it characterized not only as "inconvenient" but "undesirable and not the necessary result [of] the statutory language." 375 U.S. at 236.

It seems clear that the Supreme Court's flexible approach in *Crown Simpson* and in *Foti* tends most often to promote the purpose of special review statutes. One commentator has opined that:

> Limited special review statutes create problems other than uncertainty. The purpose underlying such an enactment to consolidate review may be frustrated by limitations which divide between forums the group of reviewable actions, creating multiple channels of review and preventing the development of expertise and consistent policy in the reviewing courts. Admittedly, in some cases the purpose to consolidate may be limited to specific actions and the restriction on the scope of special review may have been deliberate and informed by sound policy. As Professor Jaffe has noted, however, in many cases there appears to be no purpose served by the limited

> language of a special review statute, and the language appears most likely to have resulted only from legislative oversight. In such cases, the basic purposes underlying the enactment of special review statutes may argue for a broad reading of the scope of the statutory procedure.
>
> These considerations suggest that limitations in the language of special review statutes should be carefully scrutinized to determine whether there is some basis for believing the legislative choice of language was deliberate and reflected some legislative policy. Where no such basis appears, and where the ambiguity of the limitation is sure to create uncertainty and potential hardship for litigants seeking review, a purposive interpretation would suggest searching for a broad construction of the language to consolidate review in the appellate court and to ensure that litigants will not be turned down there when seeking relief.

Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 984-85 (1975).[14]

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[14] *See also* L. Jaffe, Judicial Control of Administrative Action (1965), at 158-159:

> [O]ne suspects that in most cases "bifurcation" will have been the consequence of an oversight. The result may be, at the least, untidy: a district court with little knowledge of an agency's work will be required to handle an odd case. In the absence of a conscious legislative choice, a court should ordinarily be able to skirt the shallows of literalism so as to avoid this bifurcation of channels.

Jaffe "would strive to the greatest extent possible to consolidate review in a single court. . . ." *Id.* at 422; Note, The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes, 63 B.U.L. Rev. 765, 800 (1983): "Both Congress and the federal judiciary have recognized the Court of Appeals as the preferred forum for review of most administrative action . . . Accordingly, ambiguous special review statutes should be construed to allow Courts of Appeals to review all agency actions they are institutionally competent to hear."

The court below therefore erred in declining to consider the design of section 189 beyond dismissing the legislative history as "sparse" and inconclusive. Where the intent of Congress cannot be discerned directly, the court should—as the Tenth Circuit did in *Quivira Mining Co.*—interpret the statute in a manner most likely to effectuate its purpose, which, in the case of the Atomic Energy Act, is the promotion of efficiency and uniformity. As will be shown below, the decision of the court below has the opposite effect.

B. The Court of Appeals' Decision Unnecessarily Interferes With Efficient Judicial Review of NRC Licensing Actions

1. *The Decision Below Results in Duplicative Layers of Review, Thereby Conflicting With One of the Objectives of the Administrative Orders Review Act*

This Court has emphasized that one of "the most obvious advantage[s] of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). *See also Crown Simpson, supra*, 445 U.S. at 197. That expression of sound judicial policy is well recognized. Thus, the Administrative Conference of the United States has stated that "direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system." 1 CFR § 305.75-3(g) (1984).[15]

In the instant case these views are more than generalities. One of the objectives of the Administrative Orders

[15] It is a "difficult problem to justify mandatory two-tier review as against direct circuit court review. In every case eventually appealed to the circuit courts, interposition of the district court substantially increases the cost of litigation and delays the resolution of the controversy." Currie and Goodman, Judicial Review of Federal Administrative Action: Quest For The Optimum Forum, 75 Colum. L. Rev. 1, 16 (1975); *see also* Note, 63 B.U.L. Rev. at 793.

Review Act, which is here being applied, was to effectuate the economies and efficiencies of one-tier review. Its draftsmen stated that submission to courts of appeals of "records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice." H.R. Rep. No. 2618, 81st Cong., 2d Sess. 4, reprinted in 1950 U.S. Code Cong. & Ad. News 4303, 4306.[16] Until the decision below, the courts gave effect to that objective in review of NRC denials of section 2.206 enforcement requests. In *NRDC*, the court was influenced by the duplicative layers of review that would result from successive district and circuit court review of the same agency action. 606 F.2d at 1265. It was noted in *Rockford*, 679 F.2d at 1221, that:

> Whenever the district courts have jurisdiction to review agency action, it means that anybody aggrieved by that action is entitled to two successive reviews of it—first in the district court and then, on appeal, in the court of appeals. This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's [section 2.206] request in this case: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much.

As we have demonstrated, neither the language of section 189 nor the legislative history of the Atomic Energy Act justify a contrary result.

[16] Other similar statutes have also been construed broadly to prevent the waste of judicial resources that would occur "if parties could press their case upon the administrative agency, then obtain review on the agency record in the District Court, and then enjoy an appeal as of right to the Court of Appeals, which would perform precisely the same function." Amusement and Musical Operators Ass'n. v. Copyright Royalty Tribunal, 636 F.2d 531, 534 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See also* Denberg v. United States, 696 F.2d 1193, 1197 (7th Cir. 1983), holding that "where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter . . . as it should be. . . ."

2. *The Decision Below Results in Undesirable Fragmentation of Review*

In addition to creating excessive layers of review, the holding of the court below results in the anomaly of judicial review of agency action turning on whether the NRC's decision upon a section 2.206 enforcement request is positive or negative. That is because, even in the view of the court below, any agency action taken after initiation of a show cause proceeding under § 2.202 would be reviewable as an order entered in a "formal proceeding," *i.e.*, in a proceeding in which interested persons have been offered an opportunity for a hearing pursuant to section 189(a).

Moreover, where the section 2.206 request is presented as one of several related claims, review of essentially the same issues can be splintered. In *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970), the court was influenced by these considerations to accept jurisdiction to review the Secretary of Agriculture's refusal to act on a request for suspension of registration of a chemical pending a cancellation proceeding. In response to the argument that the Court of Appeals lacked jurisdiction to review this informal, interlocutory order, but could review the final order in the cancellation proceeding, the D.C. Circuit criticized the suggested approach "for dividing between two courts the review of the various orders involved in a single administrative proceeding." In *Crown Simpson*, *supra*, this Court deemed "irrational" the "bifurcated system" proposed by the Ninth Circuit. In *Investment Company Institute v. Board of Governors of Federal Reserve System*, 551 F.2d 1270, 1276 (D.C. Cir. 1977), bifurcation was characterized as "undesirable."[17] And in his dissent from the

[17] Such bifurcation already appears to have occurred in the instant case. The court below applied well-recognized principles of exhaustion of administrative remedies to conclude that "none of the petitioner's NEPA arguments are properly before us." (Pet. App. 4). Although we agree with this conclusion, we are puzzled by the court's willingness to express a view on one of the issues presented for judicial review but not necessary for its decision while, at the same time, holding itself to be without power to consider other issues sought to be reviewed.

denial of the petition for certiorari in *General Public Utilities Corporation v. Susquehanna Valley Alliance*, 449 U.S. 1096, 1099-1100 (1981), Justice Rehnquist declared it

> anomalous to hold, as did the court below, that the Atomic Energy Act claims are reviewable exclusively in the court of appeals, while claims arising [out of the same factual setting] under NEPA, FWPCA, and the Constitution are reviewable originally in the District Court. The decision below means that the District Court, the Court of Appeals, and the Commission will all exercise concurrent jurisdiction over the same claims at the same time. Such a trifurcated review procedure is not only inefficient, duplicating judicial and administrative effort, but more importantly, it leads to premature interference with agency processes, contrary to the policy underlying direct review statutes.[18]

It is true that the court below recognized the existence of a "well-founded presumption against bifurcation of judicial forums." Nevertheless, according to the court, "it is one thing to read notions of judicial economy into statutory terms capable of assimilating them and quite another to read out Congress' jurisdictional terms in order to accommodate our own policy preferences." (Pet. App. 12). We submit, however, that the court's commendable wish to comply with legislative intent was misdirected. The traditional presumption against bifurca-

[18] *See also* Currie and Goodman, *supra*, 75 Colum. L. Rev. at 11: "Sending parties to the district court for interim relief or to enforce orders reviewable in the court of appeals splits what might be thought a single case between two forums, with varying risks of duplication, conflict, expense and delay."

tion and duplication of review proceeds as much from a perception of Congress' design as from judicial policy concerns. Consequently, reversal of the decision below would effectuate not "our own policy preferences" but those of Congress.

3. *The Decision Below Does Not Promote Uniformity or the Application of Judicial Expertise*

The Court of Appeals' inflexible approach to interpretation of section 189 ignored other policy considerations as well as ones discussed above. Perhaps the most important of these are uniformity and expertise. "[T]he great advantages of review in the courts of appeals: its capacity, or perceived capacity, for superior decisionmaking and its ability to develop and maintain a uniform and coherent case law for a large geographical area. . . ." are well recognized. Currie and Goodman, *supra*, 75 Colum. L. Rev. at 12. These characteristics are particularly important in the administration of a statute as highly complex and technical as the Atomic Energy Act, which sets national standards for radiological health and safety.[19] *Quivira Mining Co., supra.* Possible countervailing policy justifications sometimes offered to support district court review, including the need for convenient, accessible forums and for judges practiced in the art of trial procedures, are not persuasive here, since, as the discussion below indicates, review will be on the NRC record.

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[19] "[I]nconsistency may, in certain areas of administrative regulation, prevent the attainment of national policy. For example, consistent application of environmental legislation is necessary to achieve uniform national standards for air and water quality." Note, 63 B.U.L. Rev. at 793. This concern is equally apt with respect to nuclear energy.

C. The NRC Record Provides an Adequate Basis for Judicial Review

To the extent that the decision below may flow from doubts as to the adequacy of the agency record to support review in the court of appeals (Pet. App. 9), such doubts, it is submitted, are unjustified. In *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912 (D.C. Cir. 1973), the D.C. Circuit asserted jurisdiction to review a regulation promulgated by the Civil Aeronautics Board in an informal proceeding. The relevant statute, 49 U.S.C. § 1486(a), conferred jurisdiction on the appellate courts to hear appeals from final agency "orders." Rejecting earlier decisions declining to interpret the provision broadly enough to include regulations promulgated without a prior evidentiary hearing,[20] the court declared that "[i]t is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." *Id.* at 916.[21]

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[20] United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 827 (1950). Although not expressly rejecting the reasoning advanced in United Gas, the Supreme Court, in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), held that the courts of appeals had jurisdiction, under a statute addressed to "orders", to review the FCC's issuance of an amendment to its multiple owner regulations after informal rulemaking proceedings. *See also* Frozen Food Express v. United States, 351 U.S. 40 (1956); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942).

[21] Later cases have followed the reasoning of Lufthansa. *See* Investment Company Institute v. Board of Governors of Federal Reserve System, 551 F.2d 1270, 1277-79 (D.C. Cir. 1977), holding that a challenge to a Federal Reserve Board regulation and interpretive ruling supported by a record of informal rulemaking qualified as an "order" for purposes of appellate review; Sima Products Corporation v. McLucas, 612 F.2d 309, 312-13 (7th Cir.), *cert. denied*, 446 U.S. 920 (1980), holding that:

> By adopting a liberal construction of "order," FAA actions which are the product of informal rulemaking, such as in this case, may be reviewed by courts of appeals, providing an adequate administrative record has been compiled by the agency

The record customarily compiled by the NRC in section 2.206 proceedings,[22] and the record actually compiled in the proceeding below, satisfies appellate review requirements. In *NRDC*, the D.C. Circuit Court supported its holding that a determination of licensing jurisdiction is a necessary first step in a licensing proceeding by noting the existence of a reviewable factual record including comments, correspondence and other submissions received from interested parties. According to the court, the "NRC assessed the issue before it and ruled [on the basis of the submittals] that statutory language and congressional intent precluded assertion of licensing jurisdiction over the tanks . . . As long as we have an administrative record on which to base our review, as we do here, there is no need for evidentiary hearings in the district court." 606 F.2d at 1265-66.

The procedure followed by the NRC in evaluating section 2.206 requests is quite similar to the EPA action considered by the Sixth Circuit in *Ford Motor Co. v. EPA*, 567 F.2d 661, 668 (6th Cir. 1977), in which case the court declared that "[t]he factual record . . . has been sufficiently developed" to permit court of appeals review. This record consisted of an automobile manufacturer's proposed modification to a discharge permit, correspondence between Ford, the EPA and state authorities regarding compliance with water quality standards, and EPA memorada analyzing the proposed permit in

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. . . [T]he purposes of special review statutes—coherence and economy—are best served if courts of appeals exercise their exclusive jurisdiction over final agency actions.

See also City of Rochester v. Bond, 603 F.2d 927, 932 (D.C. Cir. 1979), holding that the indicium of orders reviewable within the meaning of special review statutes is the adequacy of the administrative record.

[22] *See, e.g.*, In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), 7 N.R.C. 429, 433 (1978), *aff'd*, 606 F.2d 1364 (D.C. Cir. 1979); In re Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), 14 N.R.C. 1085 (1981).

light of national water policies. *See also Sima Products, supra*, where the court found that a record consisting of a notice of proposed informal rulemaking, written comments submitted in opposition thereto, and the promulgated regulation with its published explanation "is adequate for reviewing the [plaintiff's] claim." 612 F.2d at 314-15. In each of these cases, the record was made up entirely of written submissions and claims, agency documents readily accessible to members of the public or the industry, and written analyses and responses by the administrative body. The section 2.206 evaluation process normally includes these materials.[23]

Moreover, the Administrative Procedure Act, 5 U.S.C. § 706, specifies a deferential standard of review of informal agency actions such as denials of § 2.206 requests,[24] which may be set aside only if "arbitrary and capricious." 5 U.S.C. § 706(2)(A). The NRC record in this case clearly is adequate to support this level of review. The Director considered the matters raised by each of Lorion's allegations. In his response he explained that these issues had been evaluated by the NRC, described the nature of the agency's analyses, identified the documents relied on, and offered a reasoned explanation for denying the claims. This record permits the Court of Appeals to fulfill its statutory duty of determining

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[23] Court of appeals review of denials under section 2.206 is consistent with Recommendation No. 75-3(6) of the Administrative Conference of the United States. Such review of informal administrative action is recommended when the action "[t]ypically involve[s] issues of law of broad social or economic impact . . ." which "[t]ypically do not require an evidentiary trial at the judicial level . . ." and are either few in number or are "likely to reach the appellate courts . . . even if reviewed initially by district courts." 1 CFR § 305.75-3 (1984).

[24] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971), limiting the substantial evidence standard stated in 5 U.S.C. § 706(2)(E) to formal agency action "taken pursuant to a rulemaking provision . . . or . . . based on a public adjudicatory hearing."

"whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Finally, if there is concern that the record may be inadequate for circuit court review of a Director's denial in some particular proceeding, the courts of appeals may remand the proceeding to the agency to supplement the record. The efficiency of such a remand is well recognized. Thus, in *Harrison v. PPG Industries*, 446 U.S. at 593-94, this Court observed that allowing the court of appeals the option of remanding a case to the agency when the record is insufficient might be more efficient than requiring two layers of judicial review in every case. The Court has very recently reiterated its view of the efficacy of a remand to cure any deficiency in an administrative record. *FCC v. ITT World Communications*, 52 U.S.L.W. 4507, 4509 (May 1, 1984). In *Rockford*, the Seventh Circuit agreed to review NRC denials of section 2.206 requests despite concerns that the administrative record might be inadequate. According to the court, the overall "benefits to judicial economy" justified continued judicial review in the courts of appeals, since supplementation of the record, if required in a particular case, could be accomplished by remand to the agency. 679 F.2d at 1221.[25]

[25] *See also* Porter County, 606 F.2d at 1369-70; Note, 63 B.U.L. Rev. at 801; Note, 88 Harv. L. Rev. at 990. In addition, 28 U.S.C. § 2347(b) confers powers upon the courts of appeals to remand to the agency when it is determined that required agency hearings have not been held or to transfer proceedings to district courts if a genuine issue of material fact is presented. The transfer to a district court procedure made available by 28 U.S.C. § 2347(b)(3) is apparently rarely used. We have been able to discover only one case, an interlocutory injunction proceeding, in which this procedure has been utilized. Lake Carriers' Association v. United States, 414 F.2d 567 (6th Cir. 1969). We therefore assume that the remand procedure has been found to be adequate in those cases in which the agency record has been insufficient.

In this case, the 547-page record compiled by the Director is quite sufficient to permit a court of appeals to evaluate the NRC's response to Lorion's section 2.206 enforcement request. Moreover, the efficiency considerations discussed above favoring circuit court review compel the conclusion that remand to the agency for further fact finding in appropriate cases, should the need arise, is far more preferable than elimination of direct court of appeals review. We submit the court below erred in doing so.[26]

CONCLUSION

Leading cases discussed above and supporting court of appeals jurisdiction to review section 2.206 denials were issued by the same court whose contrary decision is now before this Court for consideration. Those cases, which had been uniformly followed, give effect to the obligation

[26] In transferring the case to the District Court for the District of Columbia pursuant to 28 U.S.C. § 1631, the Court of Appeals hypothesized that "district court review of the NRC's section 2.206 decisions" could be predicated on the general federal question or acts of commerce jurisdictional statutes, 28 U.S.C. §§ 1331 and 1337. (Pet. App. 14). Nevertheless, it is possible that the jurisdictional judgment to be made is not between district court and court of appeals review of NRC denials of requests to suspend operating licenses, but as between court of appeals review and no judicial review at all. The presumption that the agency's refusal to initiate show cause proceedings in response to Lorion's request is reviewable in the district court despite the absence of a statute so providing is subject to substantial question in view of the line of authority which holds that under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), the exercise of enforcement authority is "committed to agency discretion by law" and is therefore not subject to judicial review. *See* Action on Safety and Health v. FTC, 498 F.2d 757, 762-63 (D.C. Cir. 1974); NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943); Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974); Arizona Power Authority v. Morton, 549 F.2d 1231 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977). However, the issue will not be presented if the courts of appeals' jurisdiction to review under 42 U.S.C. § 2239 and 28 U.S.C. § 2342 is reaffirmed by this Court.

of appellate courts to construe jurisdictional statutes consistently with the policies they serve. The rejection of the precedents by the court below is neither mandated by the terms of the statute nor consistent with legislative objectives. Moreover, the decision interferes with efficient administration of the regulatory scheme. The decision below should therefore be reversed.

Respectfully submitted,

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